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in the Supreme Court of the United States

OCTOBER TERM, 1992

PAINEWEBBER INCORPORATED,
Petitioner,

v.

BANKATLANTIC,
Respondent.

PETITIONER'S REPLY BRIEF IN SUPPORT OF ITS PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

Introduction

BankAtlantic's brief in opposition is largely an attack against counsel, the district judge, the court, the jurors, and the Eleventh Circuit. BankAtlantic fails to dispute the central fact compelling review by certiorari — the Eleventh Circuit affirmed the district court's judgment on the pleadings by relying on matters outside the pleadings, i.e., PaineWebber's memorandum in opposition to BankAtlantic's motion for a j.n.o.v. The Eleventh circuit's decision thus conflicts with the majority of circuits, which hold that appellate review of a pretrial disposition is limited to those matters before the district court at the time of its ruling.

Additionally, the Eleventh Circuit's opinion recedes from the economic loss rule by permitting the assertion of tort claims, despite the limitation on remedies negotiated by BankAtlantic and PaineWebber in their contract. In so doing, the decision conflicts with the public policy considerations that this Court announced in *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986), and adopted by the Florida Supreme Court in *AFM Corp v. Southern Bell Tel. & Tel. Co.*, 515 So. 2d 180 (Fla. 1987). Both *East River* and *AFM* hold that contract law, rather than tort law, is better suited to the resolution of commercial controversies. *Id.* at 872-73.

BankAtlantic's attempts to diminish the precedential significance of the Eleventh Circuit's opinion by twisting its holding and re-arguing matters relating solely to its unsuccessful case-in-chief. The Eleventh Circuit's holding with respect to PaineWebber's counterclaim creates a conflict that this Court should resolve by issuing a writ of certiorari.

I. THE DECISION CONFLICTS WITH THOSE OF THE MAJORITY OF CIRCUITS

The Eleventh Circuit's holding that it could affirm a pretrial dismissal based upon material that was not of record at the time of the district court's order conflicts with the opinions of the majority of circuits and is contrary to the opinions of this Court.[1] The holding — as precedent — creates the conflict that this Court should resolve.

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[1] *See, e.g.*, Skotak v. Tenneco Resins, Inc., 935 F.2d 909, 915-16 (5th Cir. 1991) (court of appeals may not consider evidence or arguments not presented to district court for district court's consideration in ruling on the motion), *cert. denied*, 113 S. Ct. 98 (1992); Catrett v. Johns-Manville Sales Corp., 826 F.2d 33, 37 (D.C. Cir. 1987) ("Our sole and limited task is to assess with care the record before the District Court at the time it granted Celotex's summary judgment motion and to determine whether that ruling was proper in light of the state of the record at that juncture"), *cert. denied*, 484 U.S. 1066 (1988); Glaros v. H.H. Robertson Co., 797 F.2d 1564, 1568-69 (Fed. Cir. 1986) ("To

A majority of the circuits hold that appellate review of pretrial dispositions must be limited to materials before the district court at the time of its ruling. The judgment entered with respect to PaineWebber's indemnity counterclaim was a judgment on the pleadings entered pursuant to Rule 12(c) of the Federal Rules of Civil Procedure. The rule specifically limits the entry of any such judgment to matters in the pleadings, which must be accepted as true. *United States v. Gaubert,* 111 S. Ct. 1267, 1276 (1991); *Hischon v. King & Spaulding,* 467 U.S. 69, 73 (1984); *Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974).

BankAtlantic opposes the writ of certiorari by arguing that PaineWebber's memoranda of law regarding its affirmative defenses and in support of its motion for summary judgment were before the district court at the time it entered its judgment on the pleadings against PaineWebber on its counterclaim. BankAtlantic's argument diverts the Court from the central, undisputed fact — that there was nothing of record to support the Eleventh Circuit's holding that BankAtlantic's *claims* (i.e., *complaint*) were outside the scope of the Financial Advisor Agreement. In affirming the judgment on the pleadings, the Eleventh Circuit ex-

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succeed on appeal, [appellant] must show that he did submit such evidence *before* summary judgment was granted"), *cert. dismissed,* 479 U.S. 1072 (1987); Voutour v. Vitale, 761 F.2d 812, 817 (1st Cir. 1985) ("Our review is confined to an examination of the materials before the court at the time the rulings were made. Neither the evidence offered subsequently at the trial nor the verdict is relevant."), *cert. denied,* 474 U.S. 1100 (1986); Dictograph Prods. Co. v. Sonotone Corp., 231 F.2d 867, 867-68 (2d Cir.) (appellate court has no "jurisdiction" to consider depositions or other evidence not filed in the district court when the motion was decided), *cert. dismissed,* 352 U.S. 883 (1956); Harkins Amusement Enters., Inc. v. General Cinema Corp., 850 F.2d 477, 482 (9th Cir. 1988) ("the relevant record on review of summary judgments is the record as it existed at the time the motion was considered); *see also* Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 n.16 (1970) (statement "not in the record of the proceedings below and therefore could not have been considered by the trial court. Manifestly, it cannot be properly considered by us in the disposition of the case").

pressly relied on PaineWebber's post-trial memorandum in opposition to BankAtlantic's motion for a j.n.o.v. The opinion says nothing of matters of record at the time the district court ruled.

BankAtlantic claimed that PaineWebber breached the Financial Advisor Agreement between the parties by recommending the interest rate swaps PaineWebber brokered. BankAtlantic also asserted tort claims alleging that PaineWebber breached its duties as financial advisor by recommending the interest rate swaps. The duties that BankAtlantic alleged PaineWebber breached arose pursuant to the Financial Advisor Agreement.

PaineWebber defended by arguing that no contractual or other duties arose from the Financial Advisor Agreement with respect to the interest rate swaps. PaineWebber's counterclaim sought to recover from BankAtlantic for payment of its attorneys' fees and costs pursuant to the contract's indemnity provisions, which require the reimbursement of any such expenses for the "defense of any ... claim ... arising out of or in connection with [PaineWebber's] acting pursuant to the [agreement]. ..." A-79-80.

PaineWebber's defense that it was not liable, because the swaps were outside the Agreement, does not affect or diminish its right to indemnity for BankAtlantic's claims. There is no dispute that all of BankAtlantic's claims stemmed from duties it alleged PaineWebber owed as BankAtlantic's financial advisor. Indeed, in reviewing the record in its initial opinion, the Eleventh Circuit declared:

> In its complaint, BankAtlantic alleged that it had hired PaineWebber to be BankAtlantic's financial advisor in 1984, and that PaineWebber had abused its position to derive benefits at BankAtlantic's expense.

Atlantic Fed. Savs. & Loan Ass'n. v. Blythe Eastman PaineWebber, Inc., 890 F.2d 371 (11th Cir. 1989).

BankAtlantic's brief to the Eleventh Circuit, in its most recent appeal, again made plain that its claims were entirely premised on PaineWebber's alleged failure to fulfill its duties and obligations as a financial advisor under the Agreement:

> PaineWebber owed fiduciary duties to BankAtlantic within the scope of the agreement.
>
> * * *
>
> PaineWebber's duties had been reduced to writing and were clear and unambiguous.
>
> * * *
>
> Most fundamentally of all, PaineWebber simply failed as a matter of law in its duty *as a financial advisor* to advise BankAtlantic about the financial consequences of the two interest rate swaps it recommended, which failure proximately caused BankAtlantic substantial damages.

BankAtlantic's Brief at 9, 23-24, 46 (emphasis added) (citations omitted).

PaineWebber had a clear right to indemnity under the Agreement, because BankAtlantic's claim arose "out of or in connection with [PaineWebber's] acting pursuant to the [agreement.]"[2]

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[2]In its brief in opposition to PaineWebber's petition for writ of certiorari, BankAtlantic contends that its breach of contract claim sought only return of the fees paid by PaineWebber while its tort claim sought recovery of the $30 million paid to Homestead Savings. This statement is belied by the BankAtlantic's Amended Complaint, which evidences that *all* of BankAtlantic's claims were tied to the agreement by which PaineWebber was retained as BankAtlantic's financial advisor. *See* A-85.

BankAtlantic also contends that the Eleventh Circuit's holding was based upon application of Florida law regarding contract construction. Although the Eleventh Circuit's opinion discusses Florida law, its holding was based on other grounds:

> While we agree with the district court's interpretation of the Indemnification Agreement [under Florida law], ultimately PaineWebber's assertion of its right to expenses pursuant to that agreement must be rejected on other grounds.

A-28-29. The Eleventh Circuit's holding, in affirming a judgment on the pleadings based upon PaineWebber's memorandum in opposition to BankAtlantic's motion for a j.n.o.v., creates a conflict that this Court should resolve.

II. THE OPINION RECEDES FROM THE ECONOMIC LOSS RULE

BankAtlantic argues that the Eleventh Circuit's opinion does not recede from the economic loss rule by conclusorily claiming that BankAtlantic alleged "independent torts." BankAtlantic relies on *Kee v. National Reserve Life Insurance Co.*, 918 F.2d 1538 (11th Cir. 1990), to support this argument.

Kee, however, demonstrates that BankAtlantic had no independent tort claims; instead, all of BankAtlantic's claims were based upon the Financial Advisor Agreement, which contained the indemnity provision.

BankAtlantic cites the Eleventh Circuit's statement in *Kee* that "the mere existence of a contract claim does not automatically vitiate all causes of action in tort." *Id.* at 1543. Yet, BankAtlantic ignores the Eleventh Circuit's holding that "'without some conduct resulting in personal injury or property damages, there can be no independent tort flowing from a contractual breach which would justify a tort claim solely for economic losses.'" *Id.* (quoting *AFM Corp. v. Southern Bell Tel. & Tel. Co.*, 515 So. 2d 180, 181-82 (Fla.

1987)). The Eleventh Circuit relied upon the Florida Supreme Court's opinion in *AFM*, 515 So. 2d at 181-82, as authority. As previously noted, in *AFM*, the Florida Supreme Court adopted the economic loss rule and this Court's opinion in *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986).

Moreover, the Eleventh Circuit's holding in *Kee* is directly contrary to the very arguments BankAtlantic now makes. The Eleventh Circuit applied the economic loss rule to hold that the plaintiff could *not* recover in tort. The court noted that there was no personal injury or property damage, and that the damages claimed under the contract and tort claims were identical:

> Where the compensatory damages requested in a count for tort are identical to the compensatory damages sought in a count for breach of contract, compensatory damages and punitive damages for the tort are not recoverable.

Id. at 1543.

In this case, as in *Kee*, BankAtlantic did not seek damages for personal injury or property damage. Moreover, its damage claims were identical in both its tort and contract claims. Contrary to BankAtlantic's assertion that its contract claim merely sought recovery of the fees paid to PaineWebber, each of its causes of action, tort and contract, sought the identical measure of damages — BankAtlantic's payments to Homestead pursuant to the interest rate swaps together with the fees paid to PaineWebber. A-93-95, 97-101. Thus, BankAtlantic had no tort claims independent of the Financial Advisor Agreement.

Nevertheless, in this case, the Eleventh Circuit absolved BankAtlantic of liability under the Agreement's indemnification provisions by holding that BankAtlantic somehow had independent tort claims. In so doing, the court receded from the economic loss rule and the policy an-

nounced by this Court in *East River* holding that the judiciary should refrain from "intrud[ing] into the parties' [contractual] allocation of . . . risk" by permitting the assertion of independent tort claims.

III. THE OPINION CONFLICTS WITH NATIONAL POLICY

BankAtlantic virtually ignores the fact that the Eleventh Circuit's opinion conflicts with national policy that fosters the use of alternative dispute resolution, such as indemnification agreements. The purpose of the indemnity provision in the Financial Advisor Agreement was to preclude the filing of baseless suits by corporate raiders successful in takeover attempts, which PaineWebber was retained to prevent. The indemnity provision would deter such filings by requiring BankAtlantic to pay the fees and costs incurred in defending this action.

The Eleventh Circuit, however, has failed to enforce the contractual provisions negotiated by these sophisticated parties. As a result, PaineWebber was required to engage in a five-week trial on claims that the jurors deemed "frivolous." The Court should enforce the agreed to indemnity provision in furtherance of the national policy to encourage alternative dispute resolution and to discourage attempts to skirt negotiated contractual remedies by the assertion of contrived tort claims.

CONCLUSION

A writ of certiorari should be issued to resolve the conflicting opinions of the circuit courts and to foster the national policy that prohibits interference with agreed economic risk allocation provisions.

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